Supreme Court U. S.
FILED
DEC 20 1999
CLERK

(2)

No. 99-846

IN THE

Supreme Court of the United States

DORIS PIAMBA CORTES,

Petitioner,

v.

AMERICAN AIRLINES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

RANDAL R. CRAFT, JR.
ALAN D. REITZFELD
HAIGHT GARDNER HOLLAND
& KNIGHT, A LAW OFFICE OF
HOLLAND & KNIGHT LLP
195 Broadway
New York, New York 10007
(212) 513-3200

GRIFFIN B. BELL
BYRON ATTRIDGE
CHILTON DAVIS VARNER
Counsel of Record
PAUL D. CLEMENT
KING & SPALDING
191 Peachtree Street
Atlanta, Georgia 30303
(404) 572-4600

Attorneys for Respondent

156864

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

29 pp

QUESTION PRESENTED

Whether, in order to overcome the Warsaw Convention's limitation on liability for damages, claimants must prove that employees of an air carrier subjectively knew their conduct would likely result in harm, an issue as to which the Courts of Appeals are in agreement.

STATEMENT PURSUANT TO RULE 29.6

AMR Corporation owns 100% of the stock of American Airlines, Inc.

TABLE OF CONTENTS

	Page
Question Presented	i
Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Cited Authorities	v
Reasons for Denying the Writ	3
I. There Is No Conflict Among The Circuits As To The Proper Definition Of "Willful Misconduct."	3
A. The Circuits are in Agreement that "Willful Misconduct" Must Be Judged Under a Subjective Standard.	3
B. The Senate Report Regarding the Ratification of Montreal Protocol No. 4 Confirms that United States Courts Have Always Required Subjective Knowledge.	4
C. *Tug Ocean Prince* and *Koirala* are Not Inconsistent with *Piamba Cortes*.	5
D. The Circuits Have Not Departed from Prior Precedents in Panel Opinions.	7

Contents

		Page
II.	This Case Does Not Present A Question Worthy Of Certiorari.	9
	A. The Senate's Ratification of Montreal Protocol No. 4 Has Confirmed that — Both in the Past and in the Future — the Subjective Standard Applied By the Eleventh Circuit is the Correct One. ..	10
	B. Recent IATA Agreements Have Rendered Article 25 of the Convention Irrelevant for Future Cases.	11
III.	This Court Should Not Grant Certiorari At This Stage In The Proceedings.	13
IV.	The Eleventh Circuit Did Not Misread The Legislative History Or The Executive Branch's Interpretation Of Montreal Protocol No. 4.	13
V.	The Court Below Fully Considered And Correctly Decided The Issues.	19
Conclusion		20

TABLE OF CITED AUTHORITIES

Cases: *Page*

American Constr. Co. v. Jacksonville, T. & K.W. Ry., 148 U.S. 372 (1893) 13

Berner v. British Commonwealth Pacific Airlines, 346 F.2d 532 (2d Cir. 1965) 4, 6, 7, 8, 9, 17

Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostock R.R., 389 U.S. 327 (1967) 13

Butler v. Aeromexico, 774 F.2d 429 (11th Cir. 1985) 8

Froman v. Pan-American Airways, Inc. (N.Y. Sup. Ct., N.Y. County March 9, 1953), *aff'd*, 135 N.Y.S.2d 619 (N.Y. App. Div. 1954), *appeal denied*, 137 N.Y.S.2d 821 (N.Y. App. Div. 1955), *cert. denied*, 349 U.S. 947 (1955) 15, 16, 17

Grey v. American Airlines, Inc., 227 F.2d 282 (2d Cir. 1955) 4, 7, 8, 9, 17, 18

Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251 (1916) 13

In re Air Crash Near Cali, Colombia, 985 F. Supp. 1106 (S.D. Fla. 1997) 1, 2, 10, 19

In re Air Disaster at Lockerbie, Scotland, 37 F.3d 804 (2d Cir. 1994) 4, 7

Cited Authorities

	Page
Jones v. Coughlin, 45 F.3d 677 (2d Cir. 1995)	8
KLM Royal Dutch Airline v. Tuller, 292 F.2d 775 (D.C. Cir. 1961)	8
Koirala v. Thai Airways International, Ltd., 126 F.3d 1205 (9th Cir. 1997)	5, 6, 7
LaShawn v. Barry, 87 F.3d 1389 (D.C. Cir. 1996)	8
Pekelis v. Transcontinental & Western Air, 187 F.2d 122 (2d Cir. 1951)	6, 7, 8, 9, 17, 18
Piamba Cortes v. American Airlines, Inc., 177 F.3d 1272 (11th Cir. 1999)	1, 2, 3, 6, 8, 11
Saba v. Compagnie Nationale Air France, 78 F.3d 664 (D.C. Cir. 1996)	3, 4, 8
Tug Ocean Prince, Inc. v. United States, 584 F.2d 1151 (2d Cir. 1978)	5, 6, 7, 8
United States v. Steele, 147 F.3d 1316 (11th Cir. 1998)	8
Rule:	
United States Supreme Court Rule 10	9

Cited Authorities

Page

Other Authorities:

Agreement on Measures to Implement the IATA Intercarrier Agreement (MIA) (visited Dec. 16, 1999) <*http://www/iata.org/legal/agreement.htm*> 11

Nathan Calkins, *Grand Canyon, Warsaw, and the Hague Protocol*, 23 J. Air L. & Comm. 253 (1956) 15

Convention for the Unification of Certain Rules for International Carriage by Air, done at Montreal on May 28, 1999, reprinted in Av. L. Rep. (CCH) ¶ 27,400, *et seq.* (1999) ("Montreal Convention") 12

Convention for the Unification of Certain Rules Relating to International Transportation by Air done at Warsaw on October 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), reprinted in note following 49 U.S.C. § 40105 ("Warsaw Convention") 1, 4, 10, 11, 14, 18

Currency Values in Terms of Special Drawing Rights (visited Dec. 16, 1999) <*http://www.imf.org*> .. 11

IATA/Legal (visited Dec. 16, 1999) <*http://www.iata.org/legal*> 11

Cited Authorities

Page

ICAO Update, May 1999 (visited Dec. 16, 1999) <*http://www.icao.org*> 12

Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage By Air, signed at Warsaw on October 12, 1929, as amended by the Protocol Done at the Hague on September 8, 1955, reprinted in S. Exec. Rep. No. 105-20 at 21-32 (1998) ("Montreal Protocol No. 4") ..... *passim*

S. Exec. Rep. No. 105-20 (1998) ... 5, 10, 14, 15, 17, 18

George N. Tompkins, Jr., *The Montreal Convention of 1999*, N.Y. Law J., June 29, 1999 12

The road to this Court began with a district court's unprecedented decision to deny American Airlines, Inc. ("American") a jury trial by finding as a matter of law on a motion for summary judgment that the actions of the pilots of American Flight 965 constituted "willful misconduct." The district court thereby lifted the Warsaw Convention's[1] $75,000 limitation on liability for damages in lawsuits arising out of the Flight's nighttime accident near Cali, Colombia. *See* App., 122a-123a.[2] Although there was no indication from the cockpit voice recorder that the pilots recognized the aircraft was out of the Cali valley and headed toward a nearby mountain, the court reviewed circumstantial evidence and granted summary judgment against American.

Acknowledging that "state of mind issues are especially difficult to resolve on summary judgment," App., 92a, yet determined to construe the Warsaw Convention's "liability limit as narrowly as possible," App., 103a, the district court

---

1. Convention for the Unification of Certain Rules Relating to International Transportation by Air, done at Warsaw on October 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), reprinted in note following 49 U.S.C. § 40105 ("Warsaw Convention"). Article 22 of the Warsaw Convention, as modified by the Montreal Agreement of 1966, limits the amount a passenger is entitled to recover from an air carrier to provable damages not in excess of $75,000. Under Article 25(1), however, passengers are entitled to break through the liability cap if they can prove the conduct that caused their injuries constituted "wilful misconduct." *See* App., 9a-13a (discussing background of the Warsaw Convention). Although the Warsaw Convention uses the spelling, "wilful misconduct," American, like petitioner, will use the more common spelling, "willful misconduct," except where quoted text requires otherwise.

2. For references to the opinions below, American will cite to the Appendix to the Petition for Writ of Certiorari.

crafted a new, purely objective standard to find American liable for willful misconduct. The court held that the circumstances surrounding a crash can be so egregious that a court can find willful misconduct as a matter of law simply because a pilot should have known harm was imminent, even if the pilot was in fact unaware. *See* App., 122a. This test, which precludes the necessity of exploring the actor's subjective state of mind, writes out of willful misconduct not only intent but even awareness or suspicion of the potentially dangerous consequences of the pilot's actions. *See* App., 122a-123a.

This was a singular holding. No court had ever before in a reported Warsaw Convention case displaced the factfinder to determine on summary judgment that those in charge of an aircraft acted in such a willful manner in causing a crash. *See* App., 91a (acknowledging absence of precedent).[3]

On appeal, the Eleventh Circuit Court of Appeals engaged in a thorough examination of the Convention and the tests applied by courts to determine whether "willful misconduct" had occurred. The Court of Appeals noted some ambiguity in the application of the tests applied by some Circuits but identified no split of authority. *See* App., 18a-

---

3. The district court alternatively held that willful misconduct had occurred as a matter of law under a subjective standard, even though it conceded there was contrary evidence in the record. *See* App., 133a-134a ("[T]his remark can be read as an indication that [one of the pilots], at least, believed the plane was on or very near the published route."). The Court of Appeals rejected this holding, finding instead that whether the pilots believed they were far enough off course that they realized their actions would probably result in harm to the passengers was a question for the fact finder. *See* App., 33a-36a.

19a. The Court of Appeals reversed the district court, holding that the appropriate test for willful misconduct under the Warsaw Convention was not whether the actor "should have known" his conduct presented a risk of harm but, rather, whether the actor subjectively "knew" his conduct posed a substantial risk of harm. *See* App., 28a-29a. Under the subjective test, the court determined that, although a ***factfinder*** would be entitled to draw such an inference, the evidence did not support a finding ***as a matter of law*** that the pilots in this case knew their actions would likely result in harm to the passengers. *See* App., 35a-36a. The court then remanded the case for a trial on the issue of liability. This was the right result, and there is no reason to re-examine it.

REASONS FOR DENYING THE WRIT

I.

THERE IS NO CONFLICT AMONG THE CIRCUITS AS TO THE PROPER DEFINITION OF "WILLFUL MISCONDUCT."

A. The Circuits are in Agreement that "Willful Misconduct" Must Be Judged Under a Subjective Standard.

Petitioner's alleged conflict in the Circuits as to the proper standard for willful misconduct is illusory. Prior to this case, the only Circuits squarely to address this issue agreed that a subjective test should be applied, for the airline employee's state of mind was a requisite element of willful misconduct. In 1996, the D.C. Circuit held that "[t]he wrongdoer must ***consciously be aware*** of his wrongdoing." *Saba v. Compagnie Nationale Air France*,

78 F.3d 664, 668 (D.C. Cir. 1996) (emphasis added). Thus, reckless disregard could not be shown simply by proving non-compliance with regulations, persistent lack of judgment, and lapses of common sense. *See id.* at 667-68.

The Second Circuit had recognized this subjective test for willful misconduct much earlier. In 1955, it stated that "[t]here must be a realization of the probability of injury from the conduct." *Grey v. American Airlines, Inc.*, 227 F.2d 282, 285 (2d Cir. 1955). The Second Circuit later re-affirmed this definition of willful misconduct in *Berner v. British Commonwealth Pacific Airlines*, 346 F.2d 532, 536 (2d Cir. 1965) ("[T]he [district] court in its opinion was in error in concluding that the Second Circuit does not require knowledge that damage would probably result."); *see also In re Air Disaster at Lockerbie, Scotland*, 37 F.3d 804, 838 (2d Cir. 1994) ("the issue of intent, or state of mind, is crucial in any determination of wilful misconduct").

B. The Senate Report Regarding the Ratification of Montreal Protocol No. 4 Confirms that United States Courts Have Always Required Subjective Knowledge.

While this case was pending, the United States Senate ratified Montreal Protocol No. 4, which replaced the term "willful misconduct" in Article 25 with a description of the requisite misconduct. Under amended Article 25, a passenger is entitled to break through the $75,000 liability cap by showing that his damages resulted from "an act or omission of the carrier, his servants, or agents, done with ***intent*** to cause damage or ***recklessly and with knowledge*** that damage would probably result." Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating

to International Carriage By Air, signed at Warsaw on October 12, 1929, as amended by the Protocol Done at the Hague on September 8, 1955, reprinted in S. Exec. Rep. No. 105-20 at 21-32 (1998) ("Montreal Protocol No. 4") (emphasis added).

The definition chosen by the drafters of the relevant language in Montreal Protocol No. 4 to replace the term "willful misconduct" clearly requires knowledge on the part of the actor. Importantly, the Executive Branch agencies which advised the Senate in ratifying the Protocol specifically opined that the definition was based on the interpretation of willful misconduct by United States courts and that the new definition would not change the scope of the standard in this country. *See* S. Exec. Rep. No. 105-20 at 15, 47, 52-53 (change did not modify scope of Article 25 in United States, but merely replaced the term "wilful misconduct" with its ***common law definition*** as arrived at in the courts of this country; modification will not affect United States claimants in cases under the Convention); *see also* Point IV, *infra*. Therefore, those involved in choosing and ratifying the relevant language in Montreal Protocol No. 4 certainly believed United States courts were in agreement that willful misconduct required intent or, at a minimum, knowledge that the actor's conduct would probably produce harm.

C. *Tug Ocean Prince* and *Koirala* are Not Inconsistent with *Piamba Cortes.*

In an attempt to rebut this array of precedent, petitioner has brought forward only two cases to support her argument that the federal circuits are in conflict as to whether Article 25 incorporates an objective or subjective knowledge standard: *Tug Ocean Prince, Inc. v. United States*, 584 F.2d 1151 (2d Cir. 1978), and *Koirala v. Thai Airways*

International, Ltd., 126 F.3d 1205 (9th Cir. 1997). Both are appeals from bench trials (not rulings on summary judgment), where the judge was commissioned to find facts.[4] Moreover, in both cases, the Court of Appeals applied a "clearly erroneous" standard of review to the facts and conclusions of the trial court. Neither case contradicts nor erodes the consensus discussed above.

The first, *Tug Ocean Prince*, was not even a case under the Warsaw Convention — a fact that petitioner, in her numerous references to this case, conveniently omits. It involved instead a collision of an oil barge with a rock in the Hudson River. The Court there was called upon to interpret the Water Quality Improvement Act of 1970, as amended by the Federal Water Pollution Control Act of 1972, a statute which the Court of Appeals conceded was "not a model of clarity." *Tug Ocean Prince*, 584 F.2d at 1162. By way of analogy, the Court cited *Pekelis v. Transcontinental & Western Air*, 187 F.2d 122 (2d Cir. 1951), and *Berner v. British Commonwealth Pacific Airlines*, 346 F.2d 532 (2d Cir. 1965), two Warsaw Convention cases. As described above, *Berner* requires knowledge that damage would probably result. 346 F.2d at 536. *Pekelis*, similarly,

4. This distinction is important. Defendants in those cases were afforded the opportunity to have a factfinder decide the relevant issues at trial — American was not. As the Court of Appeals acknowledged, "circumstantial evidence certainly permits a factfinder to infer that the pilots realized [their actions posed a substantial risk of harm]. This interpretation, however, is not the only reasonable inference that can be taken from this evidence, as the entry of summary judgment requires." App., 35a. Thus, the Court of Appeals decided that a ***factfinder*** should properly decide what inferences, if any, to draw concerning the pilots' awareness under the circumstances at issue, not the court as a matter of law. The cases petitioner cites are in no way at odds with that holding.

requires some form of knowledge and awareness by the actor. 187 F.2d at 124; *see* Point IV, *infra* (discussion of *Pekelis*). In the face of *Pekelis*, *Grey*, and *Berner*, the *Tug Ocean Prince* decision cannot stand for the proposition that the Second Circuit follows an objective test for the determination of willful misconduct under the Warsaw Convention. This is particularly true in light of the Second Circuit's most recent pronouncement on the issue in the *Lockerbie* decision. 37 F.3d at 838 ("Wilfulness as [used in the Warsaw Convention] involves the issue of intent . . . to perform an act with knowledge that it probably will result in injury and with disregard of that probable consequence.").

The second case, *Koirala*, is a Warsaw Convention case in which the Ninth Circuit noted that the determination of "wilful misconduct" and the actor's state of mind requires a factual inquiry. 126 F.3d at 1210. The court in *Koirala* did not endorse an objective test for determining that state of mind. Rather, in affirming the district court's finding that the limitation on liability should be lifted, the Ninth Circuit specifically acknowledged that it was using a ***subjective*** standard: "In view of the cumulative trial evidence, we cannot say the district court clearly erred in finding that the crew acted in ***conscious and reckless disregard*** of their duties, constituting wilful misconduct under the Warsaw Convention." *Id.* at 1212 (emphasis added); *see also id.* at 1211 ("[*S*]***ubjective*** standards are nearly always satisfied by circumstantial proof.").

D. The Circuits Have Not Departed from Prior Precedents in Panel Opinions.

Finally, to accept petitioner's argument that a split of authority exists, one also has to accept that the Eleventh and

D.C. Circuits departed from their prior Circuit precedents in the absence of *en banc* consideration. Petitioner's theory appears to be that the Eleventh Circuit's decision below conflicts with its prior decision in *Butler v. Aeromexico*, 774 F.2d 429 (11th Cir. 1985), and that the D.C. Circuit's opinion in *Saba* conflicts with its prior decision in *KLM Royal Dutch Airline v. Tuller*, 292 F.2d 775 (D.C. Cir. 1961). In addition, to preserve the incorrect view that the Second Circuit applies an objective standard, petitioner implicitly suggests that the Circuit Court's decision in *Tug Ocean Prince*, a non-Warsaw Convention case, overruled its prior decisions in *Pekelis*, *Grey*, and *Berner*, all Warsaw Convention cases.

This would all be quite incredible. Circuit Court panels do not overrule prior precedent. *See United States v. Steele*, 147 F.3d 1316, 1317-18 (11th Cir. 1998) (en banc) ("Under our prior precedent rule, a panel cannot overrule a prior one's holding even though convinced it is wrong."); *see also LaShawn v. Barry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996) (en banc); *Jones v. Coughlin*, 45 F.3d 677, 679 (2d Cir. 1995). That petitioner's argument requires this Court to believe it happened three times is enough to reject it.[5]

---

5. Before deciding that willful misconduct requires an analysis of the actor's subjective state of mind in this case, the Eleventh Circuit examined the tests applied in other Circuits. The court recognized the relatively broad definitions of willful misconduct adopted by certain Circuits in the first round of willful misconduct cases. For example, the Eleventh Circuit in *Butler* and the D.C. Circuit in *Tuller* included reckless disregard within those definitions. Over time, some confusion ensued over whether reckless disregard in this context should be judged by an objective or subjective standard. The *Saba* and now *Piamba Cortes* courts have revisited the issue and clarified that reckless disregard involves subjective

(Cont'd)

The Eleventh Circuit did not create a conflict when it found that "willful misconduct" requires a subjective inquiry into the state of mind of the airline employee; it ***resolved*** one created by the error of the district court. In doing so, the Court of Appeals merely confirmed its alignment with its sister Circuits.

II.

THIS CASE DOES NOT PRESENT A QUESTION WORTHY OF CERTIORARI.

The Supreme Court rules leave little question about the constricted boundaries of the writ of certiorari: "Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. While undoubtedly of considerable importance to petitioner and American, this case is an anomaly, and it is extremely unlikely indeed that the issues it presents will recur.

(Cont'd)

intent — something the Second Circuit recognized from the beginning in *Grey*, *Pekelis*, and *Berner*. Thus, there has been no overruling of prior panel opinion precedent, and there is no split of authority (although one would have been created had the Eleventh Circuit affirmed, rather than reversed, the district court's judgment).

A. The Senate's Ratification of Montreal Protocol No. 4 Has Confirmed that — Both in the Past and in the Future — the Subjective Standard Applied By the Eleventh Circuit is the Correct One.

Before this case, the United States had been a party to the Warsaw Convention for 65 years, and yet no trial court had ever entered summary judgment in favor of plaintiffs on the issue of willful misconduct in any reported case. This case was a first, as the trial court admitted. *See* App., 91a.

Going forward, there is no reason to suspect that the issue of willful misconduct requires direction from this Court. Montreal Protocol No. 4 clarifies that "willful misconduct" under Article 25 of the Warsaw Convention has been and will be determined by what is clearly a ***subjective*** test. *See* S. Exec Rep. No. 105-20 at 15, 47, 52-53 (stating that the new definition did not modify the scope of "willful misconduct" in the United States). The question central to this case and this petition — whether the Convention's limitation on liability for damages can be lifted where an airline employee does not apprehend the danger created by his conduct — has been clearly answered in the negative by Montreal Protocol No. 4 and its legislative history. *See* Point IV, *infra*.

This clarification should remove any lingering uncertainty as to whether the "willful misconduct" standard should be judged by an objective or subjective test. In light of this recent clarification, there is no need for the Court to grant certiorari. Indeed, it would be premature for this Court to consider certiorari until the lower courts have had an opportunity to apply the instructive language of Montreal Protocol No. 4.

B. Recent IATA Agreements Have Rendered Article 25 of the Convention Irrelevant for Future Cases.

Not only has the subjective nature of "willful misconduct" under Article 25 been clarified by Montreal Protocol No. 4, its relevance in cases other than this one has been virtually extinguished by recent, private actions of the world's major international airlines. As petitioner herself concedes, "by 1998, . . . most of the world's major airlines had signed inter-carrier agreements prepared in 1995 by the International Air Transport Association ("IATA"), by which the airlines waived the Article 22 liability cap, ***rendering Article 25 irrelevant for future Warsaw Convention cases.***" Pet. at 4-5, note 5 (emphasis added); *see also IATA/Legal* (visited Dec. 16, 1999) *<http://www.iata.org/legal>* (containing summaries and text of agreements, as well as lists of carriers signatory to the agreements).

Under the IATA agreements, carriers are strictly liable up to 100,000 "special drawing rights," or SDRs, which is roughly equivalent to $137,000.[6] In addition, carriers are liable for damages in excess of 100,000 SDRs unless they can prove that they and their agents have taken "all necessary measures to avoid the damage or that it was impossible for them to take such measures." *See Agreement on Measures to Implement the IATA Intercarrier Agreement (MIA)* (visited Dec. 16, 1999) *<http://www/iata.org/legal/agreement.htm>*; App., 13a, note 4. "Willful misconduct" is no longer relevant under these agreements.

---

6. SDRs are a type of international "currency" created by the International Monetary Fund. On Thursday, December 16, 1999, 100,000 SDRs equaled approximately $137,000. *See Currency Values in Terms of Special Drawing Rights* (visited Dec. 16, 1999) *<http://www.imf.org>*.

To the same effect, and ultimately more significant, is the Montreal Convention, which was recently adopted and signed by representatives of 52 nations, including the United States. *See* Convention for the Unification of Certain Rules for International Carriage by Air, done at Montreal on May 28, 1999, reprinted in Av. L. Rep. (CCH) ¶ 27,400, *et seq.* (1999) ("Montreal Convention"). The Montreal Convention incorporates, in substance, the same liability scheme as the IATA agreements: strict liability up to 100,000 SDRs and a rebuttable presumption of liability for damages beyond that amount. *See id*; *see also ICAO Update, May 1999* (visited Dec. 16, 1999) <*http://www.icao.org*>; George N. Tompkins, Jr., *The Montreal Convention of 1999*, N.Y. Law J., June 29, 1999, at 3. The Montreal Convention will enter into force as soon as it has been ratified by 30 states, a process the International Civil Aviation Organization ("ICAO"), which convened the conference where the Montreal Convention was adopted, believes could be achieved as early as the end of 2000. *See ICAO Update, May 1999* (visited Dec. 16, 1999) <*http://www.icao.org*>. As with the IATA agreements, willful misconduct will no longer be relevant under the Montreal Convention.

If the Warsaw Convention's limitation on liability for damages is no longer relevant after the IATA agreements and will no longer be relevant under the Montreal Convention, perforce the fashion in which that limitation may be lifted does not deserve the attention of this Court. Time has passed this issue by.

III.

THIS COURT SHOULD NOT GRANT CERTIORARI AT THIS STAGE IN THE PROCEEDINGS.

The Eleventh Circuit reversed the district court's grant of summary judgment in favor of petitioner and remanded the case for trial. Accordingly, petitioner seeks review of an interlocutory order, rather than a final judgment. This Court has long cautioned that "this court should not issue a writ of certiorari to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Constr. Co. v. Jacksonville, T. & K.W. Ry.*, 148 U.S. 372, 384 (1893). The possibility that the further proceedings may moot or shed additional light on the question presented strongly counsels against granting review before final judgment. *See, e.g., Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostock R.R.*, 389 U.S. 327, 328 (1967); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

IV.

THE ELEVENTH CIRCUIT DID NOT MISREAD THE LEGISLATIVE HISTORY OR THE EXECUTIVE BRANCH'S INTERPRETATION OF MONTREAL PROTOCOL NO. 4.

This Court generally does not employ its certiorari jurisdiction to engage in error correction. Nonetheless, petitioner dedicates most of her petition to re-arguing the merits of her unsuccessful position on appeal. Not only are

petitioner's efforts irrelevant, they are also mistaken, for the Eleventh Circuit properly construed the legislative history and Executive Branch interpretation of the Montreal Protocol.

Petitioner claims the Eleventh Circuit's determination that Article 25, as amended by Montreal Protocol No. 4, incorporates a subjective standard for willful misconduct conflicts with the legislative history and the Executive Branch's interpretation of the amended language. To the contrary, statements of Executive Branch agencies included by the Senate in its report on Montreal Protocol No. 4 reflect just the opposite.

In the years after the Warsaw Convention was adopted, a split developed between the way United States courts interpreted willful misconduct under common law and the more lenient fashion in which foreign civil law jurisdictions defined the term. Montreal Protocol No. 4, and its predecessor, the Hague Protocol,[7] addressed that conflict and implemented the American common law standard for willful misconduct as the uniform definition to be applied in all foreign countries adopting these Protocols to the Warsaw Convention. The Protocols clarified that willful misconduct requires a finding that an airline employee acted with either: (a) ***intent*** to cause injury; or (b) ***knowledge*** that injury would

---

7. The relevant language of Montreal Protocol No. 4 was originally drafted for the Hague Protocol in 1955. Although the United States never adopted the Hague Protocol, the Senate, in ratifying Montreal Protocol No. 4, adopted the definition of willful misconduct included in the Hague Protocol. *See* S. Exec. Rep. No. 105-20, at 8 ("Pursuant to Article XIX of Protocol No. 4, if the United States ratifies Protocol No. 4, it also will accede to the Hague Protocol of 1955.").

probably result from his or her conduct. *See* S. Exec. Rep. No. 105-20, at 15 (hereinafter "Senate Report"). Both of these standards require investigation of the actor's subjective state of mind.

The deliberations over the revised language in the Protocols confirmed the drafters' intent that willful misconduct under the Convention be measured by the subjective standard developed and endorsed by American courts, rather than by the less demanding standard followed in civil law countries. In response to a question from the Senate Committee on Foreign Relations, the State Department explained that:

> Because the concept of willful misconduct came to have different connotations in the civil and common law systems, the drafters of Hague replaced the legal standard with a description of the conduct itself, that a jury would be able to understand. This standard has been identified as the ***common law definition*** of "willful misconduct."

S. Exec. Rep. No. 105-20, at 15 (emphasis added).

According to the Senate Report, that common law definition of willful misconduct was memorialized in a jury charge in *Froman v. Pan-American Airways, Inc.* (N.Y. Sup. Ct., N.Y. County March 9, 1953), *aff'd*, 135 N.Y.S.2d 619 (N.Y. App. Div. 1954), *appeal denied*, 137 N.Y.S.2d 821 (N.Y. App. Div. 1955), *cert. denied*, 349 U.S. 947 (1955). *See* S. Exec. Rep. No. 105-20, at 47; *see also* Nathan Calkins, *Grand Canyon, Warsaw, and the Hague Protocol*, 23 J. Air L. & Comm. 253, 266 (1956) (noting that the Hague Protocol

adopted the *Froman* jury charge). That jury instruction explained that "willful misconduct" was to be measured against a subjective standard:

> "Willful" ordinarily means intentional; that the act that was done was what the person doing it meant to do. But the phrase "willful misconduct" means something more than that. It means that in addition to doing the act in question, that the actor must have ***intended*** the result that came about or must have launched on such a line of conduct with ***knowledge*** of what the consequences probably would be and have gone ahead recklessly despite his ***knowledge*** of those conditions.

See Froman, p. 452-53 (emphasis added). In further clarification that willful misconduct requires knowledge, not only of the action, but also of the danger that the action poses, the jury instruction included the following example:

> If a driver drives down a street and his attention is attracted to something on the sidewalk or if he is looking for a house and if instead of looking ahead of him he looks out the window of the car, that is negligence, but it is ***not*** willful misconduct, even though his act of looking out the car is intentional; he means to look out of the car. But he does not mean or does not have in mind that if he does look out of the car something unfortunate is likely to happen. So even though that is carelessness, and may be very gross carelessness, it is not willful misconduct.

> If, on the other hand, a driver takes out a car ***knowing*** that the brakes are so defective that he cannot stop and ***knowing*** that that is something that is ***likely to result*** in an accident but he nevertheless does it and an accident occurs, that is willful misconduct.

Id. at 453 (emphasis added).

The Senate Report also referred to *Pekelis v. Transcontinental & Western Air, Inc.*, 187 F.2d 122 (2d Cir. 1951), and *Grey v. American Airlines, Inc.*, 227 F.2d 282 (2d Cir. 1955), as correctly setting forth the standard for willful misconduct under the Montreal Protocol. *See* S. Exec. Rep. No. 105-20, at 53. In *Pekelis*, the court upheld the trial court's charge that defined willful misconduct as:

> the ***intentional*** performance of an act with ***knowledge*** that the performance of that act will probably result in injury or damage, or it may be the ***intentional*** performance of an act in such a manner as to imply reckless disregard for the probable consequences of the performance of the act [; or] . . . the intentional omission of some act, with knowledge that such omission will probably result in danger or injury. . . .

187 F.2d at 124 (emphasis added) (quoted in S. Exec. Rep. No. 105-20, at 53). *Pekelis*, therefore, required that the actor appreciate the consequences of his actions and nonetheless proceed in reckless disregard of those consequences. *See Berner*, 346 F.2d at 536-37 (interpreting *Pekelis* as requiring knowledge that harm would probably result).

Similarly, *Grey* defined willful misconduct as:

> a ***conscious intent*** to do or omit doing an act from which harm results to another, or an intentional omission of a manifest duty. There must be a ***realization of the probability of injury*** from the conduct, and a disregard of the probable consequences of such conduct.

227 F.2d at 285 (emphasis added) (*citing Pekelis*, 187 F.2d 122) (quoted in S. Exec. Rep. No. 105-20, at 53). *Grey* thus also required a subjective awareness of the harm that could result from the actor's conduct.

The legislative history surrounding the relevant language in Montreal Protocol No. 4, therefore, demonstrates that amended Article 25 was intended to reflect the consensus of American courts as to what willful misconduct requires, *i.e.*, subjective knowledge. As a result, those advising the Senate on the ratification of the Protocol in the United States could state with confidence that the Protocol merely restated — and did not change — the standard for willful misconduct as applied by courts in this country. *See, e.g.*, S. Exec. Rep. No. 105-20, at 15 ("[T]he substitution of this language for 'willful misconduct' does not modify the scope of the standard. Instead, it is a clarifying response to the difficulties that arose from differing translations of the text in various languages."); *id.* at 53 ("[I]n light of the above-quoted definitions [from *Pekelis* and *Grey*], it is our view that the amendment to Article 25 will have no practical effect on the rights of claimants in cases under the Warsaw Convention.").

In deciding that those involved in the drafting of the amended language of Montreal Protocol No. 4 and its later ratification meant what they said, the Eleventh Circuit Court of Appeals misinterpreted nothing. Instead, the court merely joined the consensus that Montreal Protocol No. 4 was intended to cement.

V.

THE COURT BELOW FULLY CONSIDERED AND CORRECTLY DECIDED THE ISSUES.

Plaintiffs have had their day in court. The district court afforded them four days of hearings on their Motion for Summary Judgment and a 47-page opinion staking out an isolated and incorrect interpretation of the Warsaw Convention. The Court of Appeals could have easily disposed of this case on the simple rationale that — as the cases repeatedly recite — "willful misconduct" is assuredly an issue of state of mind requiring a factual inquiry, and hence the case was an inappropriate one for summary judgment. After all, no other court had ever been so bold or so far-reaching in its exercise of summary judgment powers. *See* App., 91a (district court acknowledging that it was the first to so hold).

Instead, the Eleventh Circuit gave painstaking attention to all of plaintiffs' arguments. The Court entertained oral arguments of unusual length (a total of approximately one and one-half hours) and requested supplemental briefing on the impact of Montreal Protocol No. 4. The Court produced a scholarly, thoroughly-researched 36-page examination of the history and application of the Warsaw Convention.

There have been no shortcuts and no miscarriage of justice here. There has been only a fair result that leaves no issue deserving the attention of this Court.

CONCLUSION

Based upon the foregoing, review by this Court is neither necessary nor appropriate. Respondent respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

GRIFFIN B. BELL
BYRON ATTRIDGE
CHILTON DAVIS VARNER
Counsel of Record
PAUL D. CLEMENT
KING & SPALDING
191 Peachtree Street
Atlanta, Georgia 30303
(404) 572-4600

RANDAL R. CRAFT, JR.
ALAN D. REITZFELD
HAIGHT GARDNER HOLLAND
& KNIGHT, A LAW OFFICE OF
HOLLAND & KNIGHT LLP
195 Broadway
New York, New York 10007
(212) 513-3200

Attorneys for Respondent